Supreme Court, U.S.
FILED

01 584 OCT - 4 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Of counsel:
EDWARD L. SCOTT
409 Southeast Fort King Street
Ocala, Florida 34471
(352) 622-2264

SCOTT CHARLTON
CLARK, CHARLTON & MARTINO, P.A.
3407 West Kennedy Boulevard
Tampa, Florida 33623
(813) 879-0700

JOHN G. CRABTREE
Counsel of Record

THOMAS M. PFLAUM
JOHN G. CRABTREE, P.A.
240 Crandon Boulevard
Suite 279
Key Biscayne, Florida 33149
(305) 423-4350
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65 pp

QUESTION PRESENTED

The petitioners were fired as part of a corporate reorganization in which more than 70% of the persons fired were, like them, at least 40 years old. The court of appeals held that the Age Discrimination in Employment Act of 1967 did not under any circumstances permit a disparate impact method of proving age discrimination. The question presented is:

Is a disparate impact method of proving age discrimination available to plaintiffs suing under the ADEA?

PARTIES TO THE PROCEEDING IN THIS COURT

In addition to the persons named in the caption, the petitioners in this proceeding are James Akin, Linda Baldwin, Willis Barnes, Elaine Barnes-Foster, Philip Bassa, Larry Bayes, Patsy Baynard, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Earl Bettis, Richard L. Boreman, Jerold A. Boyle, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Donald P. Broeckel, Richard Brown, Lorin Bryan, Robert Bunch, Judith A. Carey, Thomas Catlett Jr., Charles Coffman, Marjorie Copeland, Kenneth Corbett, Earl Doby, Samuel Dupuy, Tom Engers, Gwendolyn Evans, Paul Fintak, Ray Forehand, Mark Foster, Gregg Frangipane, Robert Freeland, John Fremgen, Valerie Fronza, John Gallagher, Narendra Garg, Mickey Gauldin, Polly Gillespie, Ralph Graves, Linda Groseclose, Michael Harmeling, Thomas Hays, Eugene Hayward, Gopal Hegde, David Hodgson, Peter Holliday, Roy C. Hooks, William E. Hoover, Dayton Jackson, Douglas Janowski, Carrie Jones, William Kenefik, Stephen Koon, Gerald Lamm II, Kermit Lassiter, Saranan Lauck, Thomas Livingston Jr., Raymond P. Long, Linda Maraget, John Mascoll, Robert Mason Jr., Gloria Maxwell, Mary McCoy, Carol McFadden, Annie McKinney, Richard Merriman, James Moock, Michael Moore, David Morris, Thomas Neaman Jr., James L. Owens, William Passmore, Adolfo Paz, James M. Pennington, Mark Petersen, Andre Poulard, Trevor Daniel Putnam, Marcia Quinn, David Reed, Joe Reid, William B. Rich, Alexa Richardson, Terrance W. Ryan, Patti Jo Vitte Schmidt, Lorene Scott, Terrie Scott, Randy Seifert, John Serba, R.

PARTIES TO THE PROCEEDING IN THIS COURT – Continued

Darwin Shiflett, Jiri Skala, James C. Smith, Janet Smith, William A. Smith, Sara Smith-Hayman, Patricia Solki, George Allen Suban, William Sullivan, Steve R. Twitty, Edward Ural, Robert Urban, Joseph B. Vaughan, David Visser, Daniel Wagner, Chester Wagoner, Gary Waldo, Dianne K. Westbrook, Wendy Wheeler, Carl E. Williams Jr., Dale Wilson, Barry Wood and Guy Zissimopulos.

The respondents in this proceeding are named in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING IN THIS COURT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	3
A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw	4
B. Proceedings Below	8
REASONS FOR GRANTING THE PETITION	13
I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth and Ninth Circuits' Interpretation, and Exacerbates an Existing Conflict in the Circuits	14
II. The Decision of the Court of Appeals Is Erroneous	16
III. The Question Presented Is Important	22
CONCLUSION	25
APPENDIX A	1a
APPENDIX B	19a
APPENDIX C	28a

TABLE OF AUTHORITIES

	Page
CASES	
Blackwell v. Cole Taylor Bank, 152 F.3d 666 (7th Cir. 1998)	14
Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984)	12
Criley v. Delta Air Lines, 119 F.3d 102 (2d Cir. 1997)	14
Connecticut v. Teal, 457 U.S. 440 (1982)	19
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), *cert. denied*, 516 U.S. 916 (1995)	15
Edwards v. Shalala, 64 F.3d 601 (11th Cir. 1995)	12
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994)	18, 19
EEOC v. Governor Mifflin School District, 623 F. Supp. 734 (E.D. Pa. 1985)	7
EEOC v. McDonnell Douglas, 191 F.3d 948 (8th Cir. 1999)	14
EEOC v. Newport Mesa Unified School District, 893 F. Supp. 927 (C.D. Cal. 1995)	21
EEOC v. Wyoming, 460 U.S. 226 (1983)	5
Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996), *cert. denied*, 517 U.S. 1245 (1996)	14, 18
Finnegan v. Trans World Airlines, 967 F.2d 1161 (7th Cir. 1992)	8
Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1247 (2001)	14

TABLE OF AUTHORITIES – Continued

Page

Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980) 6

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 7, 8, 14, 18, 20

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 4, 5, 13, 14, 19

Johnson v. Mayor and City of Baltimore, 472 U.S. 361 (1985) 5

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 21

Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994) 12

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 15

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) 6

Lorillard v. Pons, 434 U.S. 575 (1978) 5, 6, 7

Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995) 15

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 5

Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) 18

Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) 14, 18

Pauley v. BethEnergy Mines, 501 U.S. 680 (1991) 12

United Independent Flight Officers v. United Air Lines, 572 F. Supp. 1494 (N.D. Ill. 1983) 6

TABLE OF AUTHORITIES – Continued

Page

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 8

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 19

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1331 3

29 U.S.C. § 206(d)(1) 3, 10, 12

29 U.S.C. § 216(b) 9

29 U.S.C. § 623(a) 1, 5, 6

29 U.S.C. § 623(f)(1) 1, 6

29 U.S.C. § 626(c) 3

29 U.S.C. § 626(f) 2, 8

42 U.S.C. § 2000e-2(a)(2) 2, 17

42 U.S.C. § 2000e-2(k)(1)(A) 8

29 C.F.R. § 1625.7(d) 7, 12

MISCELLANEOUS

Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) 7

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986) 7

Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984) 7

H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967) 5

U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965) 5

Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000) 16, 23

Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000) 16, 23

Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000) 16, 18, 22

Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982) 16

David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001) 16, 23

TABLE OF AUTHORITIES – Continued

Page

Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997) 16, 20, 23

Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995) 16

Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996) 16

Antonin Scalia, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29-37 (Amy Gutmann ed., 1997) 18

Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517 (1995) 17

Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996) 16

Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) 16

PETITION FOR A WRIT OF CERTIORARI

Wanda Adams, Leo L. Floyd and the other petitioners (collectively, the Adams Group) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-18a) is reported at 255 F.3d 1322. The opinions of the district court (App., *infra*, 19a-30a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 5, 2001 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) & (f)(1), provide:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] to limit, segregate, or

> classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.
>
> * * *
>
> It shall not be unlawful for an employer * * * to take any action otherwise prohibited under [the preceding subsections] of this section where * * * the differentiation is based on reasonable factors other than age.

The relevant portion of the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f), provides:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum * * * if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer * * * informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to * * * (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The relevant portion of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), provides:

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees or applicants for employment in

> any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The relevant portion of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), provides:

> No employer * * * shall discriminate * * * between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to * * * a differential based on any other factor other than sex.

STATEMENT

The members of the Adams Group are 117 older former employees of the respondent Florida Power Corporation that the company fired during a corporate reorganization in which more than 70% of the employees who were fired were at least 40 years old. Invoking jurisdiction under 29 U.S.C. § 626(c) and 28 U.S.C. § 1331, members of the Adams Group sued Florida Power and its parent, Florida Progress Corporation, in the United States District Court for the Middle District of Florida and alleged that Florida Power had discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The case was

conditionally certified as an opt-in class action under disparate impact and disparate treatment theories of liability, and the remaining members of the Adams Group joined the case.

Noting that the "circuits are remarkably divided on the issue" (App., *infra*, 24a), the district court subsequently decided that disparate impact claims could not be brought under the ADEA and decertified the class. Acknowledging that its decision conflicted with three circuits, but followed at least three other circuits, the court of appeals made a legal "pronouncement in the abstract" (App., *infra*, 2a n.1) that disparate impact liability was not available under the ADEA and affirmed.

A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw

This case asks whether the ADEA permits a disparate impact method of proving discrimination like the one employed in Title VII of the Civil Rights Act of 1964, permits no disparate impact method of proving discrimination under any circumstances, or permits *some* disparate impact method of proving discrimination—but under circumstances more limited than those available under Title VII. Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

In a 1965 report submitted to Congress two years before the enactment of the ADEA, the Secretary of Labor

stated that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965). Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Designed to combat "pervasive discrimination against the elderly," *Johnson v. Mayor and City of Baltimore*, 472 U.S. 361, 369 (1985), stemming from "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "the ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify his employees in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. § 623(a)(2). As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584. A noted statutory difference between the ADEA and Title VII, however, is that an action "otherwise prohibited" by the ADEA is lawful "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Title VII does not have this express exception.

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address, *inter alia*, arbitrary discrimination and systemic discrimination that could not be detected and proven in the same way that invidious discrimination is detected and proven, by permitting claims to proceed on the basis of disparate impact model of proof. As a court-imposed exception to disparate impact liability, the Court held that an employer defending an otherwise adequate disparate impact case could prevail if it established that its challenged practice was based upon a "business necessity."

Following *Griggs*, multiple courts applied the Title VII disparate impact model to ADEA cases: *See, e.g., Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980); *United Independent Flight Officers v. United Air Lines*, 572

F. Supp. 1494, 1505 (N.D. Ill. 1983). And, the relevant EEOC interpretive guidelines suggest that the "reasonable factors" defense in the ADEA works with the business necessity defense in the disparate impact analysis. The guidelines provide that an employer may raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d) (1999).

Congress amended the ADEA several times after *Griggs*. *See, e.g.*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984). Congress has never acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases.[1] *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D. Pa. 1985). To the contrary, the 1990 Congress amended the ADEA by adding the OWBPA and requiring that employers provide employees with *statistical information* regarding the ages of co-workers offered severance pay (and of those co-workers who were not let go) before employees could waive any potential age discrimination

---

[1] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580.

claims. 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990).

In 1987, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation. Partially in response to *Ward's Cove*, Congress subsequently codified the *Griggs* Title VII disparate impact model into the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). Congress did not make any similar amendment to the ADEA. As late as 1992, however, Judge Posner recognized that "the weight of authority * * * is that disparate impact is a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161 (7th Cir. 1992).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

B. Proceedings Below

The Adams Group consists of 117 former employees of Florida Power who were at least 40 years old when the company fired them as part of an alleged reduction-in-force that began in 1992 and concluded in 1996. Over 70% of the personnel terminated were over the age of 40.

App., *infra*, 2a; Doc. 216-3; Doc. 67-4; Doc. 234-2.[2] Members of the Adams Group filed a complaint in the Middle District of Florida and alleged that Florida Power had violated the ADEA by (1) willfully discriminating against senior employees on the basis of their age, and (2) disparately impacting older employees, a result that could have been avoided by other means sufficient to satisfy Florida Power's business needs. App., *infra*, 2a-3a; Doc. 216-10-11.[3] The company and its parent denied any violation of the ADEA and asserted that Florida Power had legitimate, non-discriminatory reasons for firing the Adams Group. Doc. 218-11-16.

The district court conditionally certified a class in 1996, and potential class members were notified of their right to opt-in to the suit. App., *infra*, 3a; Doc. 84-1. The remaining members of the Adams Group then joined the case. Doc. 215-11 n.7. Two years later, the court decertified the class based upon its determination that (1) disparate impact analysis was not available under the ADEA, and (2) the class members could not be deemed similarly situated, as required under 29 U.S.C. § 216(b) for certification, unless their claims could be premised on a theory of disparate impact. App., *infra*, 3a. The district court judge certified the question of ADEA disparate

---

[2] Given the procedural posture of the case, the allegations and evidence favoring the Adams Group are assumed true for purposes of this petition. *See* App., *infra*, 2a n.1, and *id.* at 3a-4a.

[3] Since these allegations are the same for each of the members of the Adams Group, reference is simply made to the first instance of ADEA allegations in the complaint (*i.e.*, Wanda Adams), as well as to the first instance of Florida Power's denial of those allegations.

impact to the Eleventh Circuit under 28 U.S.C. § 1292(b) because the question presented a controlling issue of law in the case and, since the circuits were "remarkably divided on the issue" (*id.* at 24a), he believed there were substantial grounds for disagreement over his decision (*id.* at 2a-3a).

The Eleventh Circuit accepted the case and, in an opinion joined by two members of the panel, affirmed. *Id.* at 8a. The court based its decision upon four grounds. First, the ADEA's exception for "reasonable factors other than age" does not exist in Title VII. *Id.* at 6a. Second, the court determined that this ADEA exception is similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. App., *infra*, 7a. Third, the court of appeals found that the legislative history of the ADEA is unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Ibid.* Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA.

In its conclusion, the court stated:

> The Second, Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not.[4] We find the reasoning of the Tenth Circuit * * * and the First Circuit * *'* persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

App., *infra*, 8a.

In a special concurrence, Judge Barkett disagreed with the panel's analysis and concluded that "disparate impact can be pled and proved in an appropriate case under the ADEA, and that it cannot be said as a matter of law that this theory can never be used in an age discrimination case."[5] She pointed to the similarities of the policies behind Title VII and the ADEA and argued that the ADEA's exception for "reasonable factors other than age" added nothing beyond what the Court had required in *Griggs* for Title VII plaintiffs, *i.e.*, that the challenged practice is neither "founded on 'business necessity,' [nor] lacks 'a manifest relationship to the employment.' " App., *infra*, 11a-12a (quoting *Griggs*, 401 U.S. at 431).

---

[4] This is actually a misstatement. As discussed in the first reason for granting the petition, *infra*, the Third and Sixth Circuits have not held that that the disparate impact method of proving age discrimination is inapplicable to the ADEA.

[5] Judge Barkett would have affirmed based upon her determination that the Adams Group had not sufficiently alleged disparate impact and that the court of appeals was thus making a "pronouncement in the abstract." App., *infra*, 9a. Without reaching the sufficiency of the disparate impact allegations, the majority retorted that Judge Barkett's position was "inconsistent with the posture of the case. * * * Indeed, because the district court certified only the question of law to us, a 'pronouncement in the abstract' is required." *Id.* at 2a n.1.

Noting that the EEOC interpretive guidelines, 29 C.F.R. § 1625.7(d), are entitled to judicial deference,[6] the concurrence found that those guidelines suggest the ADEA's reasonable factors defense works in tandem with Title VII's business necessity defense. App., *infra*, 12a. Additionally, the concurrence observed that Congress had amended the ADEA several times after federal courts had held that disparate impact was available to ADEA plaintiffs, yet Congress had never sought to exclude disparate impact claims. *Id.* at 13a.

With respect to the asserted similarity between EPA's exception and the ADEA's exception, the concurrence made two distinctions: First, the question of disparate impact concerns the substantive provisions of the ADEA, which are similar to the substantive provisions of Title VII, not the remedial provisions of the EPA. *Id.* at 14a. Second, the EPA exception permits pay discrepancies for "any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), and thus requires only a neutral explanation for pay disparity to ensure that employers can only be liable for "intentional purposeful discrimination." App., *infra*, 14a. The ADEA exception requires, however, that the employer show the *reasonableness* of the neutral factor. *Id.* at 14a-15a.

---

[6] App., *infra*, 12a n.4 (citing *Edwards v. Shalala*, 64 F.3d 601, 606 (11th Cir. 1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (10th Cir. 1994)); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696-98 (1991); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984)).

Finally, with respect to the Secretary of Labor's 1965 report preceding enactment of the ADEA, the concurrence acknowledged that the "report differentiated between what it termed 'arbitrary discrimination' based on age and problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees.' " *Id.* at 18a. Unlike the majority, however, the concurrence did not conclude that this differentiation precluded disparate impact claims. "The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination." *Ibid.*

REASONS FOR GRANTING THE PETITION

In *Hazen Paper*, the Court indicated that Title VII's disparate impact analysis *might* not be available to ADEA plaintiffs: "we have never decided whether a disparate impact theory of liability is available under the ADEA * * * and we need not do so here."[7] A clear division in the circuits ensued. As the Eleventh Circuit acknowledged (App., *infra*, 8a), its post-*Hazen* decision in this case conflicts with the post-*Hazen* decisions of the Second, Eighth and Ninth Circuits—and aligns the court with the First, Seventh and Tenth Circuits. Moreover, the decision below is erroneous, and the divisive federal question presented in this case is important.

---

[7] 507 U.S. at 609-11.

I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth and Ninth Circuits' Interpretation, and Exacerbates an Existing Conflict in the Circuits.

It is hard to conceive of a case presenting a clearer example of conflict in the circuits—a conflict the district court characterized as *remarkable* (App., *infra*, 24a). In short, the decisions of the Second, Eighth and Ninth Circuits conflict with the decisions of the First, Seventh and Tenth Circuits: ***Compare*** *Criley v. Delta Air Lines*, 119 F.3d 102, 105 (2d Cir. 1997) ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, [*Hazen*, 507 U.S. at 610], in our circuit, we have recognized such an action."); *E.E.O.C. v. McDonnell Douglas*, 191 F.3d 948, 950 (8th Cir. 1999) ("While several of our sister circuits have held that the ADEA cannot support claims based on disparate impact * * * the law of this circuit is that disparate-impact claims are cognizable under the ADEA"); and *Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1247 (2001) ("We have since [*Hazen Paper*] squarely decided that a disparate impact claim is cognizable in an ADEA case. * * * [W]e again hold that a disparate impact claim is cognizable under the ADEA"), ***with*** *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) (the Title VII disparate impact model announced in "*Griggs* is inapposite in the ADEA context"); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998) ("disparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA"); and *Ellis v. United Airlines*, 73 F.3d 999, 1006-07 (10th Cir. 1996),

cert. denied, 517 U.S. 1245 (1996) ("disparate impact claims are not cognizable under the ADEA"). Thus three circuits have expressly held that the disparate impact method of proving age discrimination is available in ADEA cases, and four circuits have expressly held that the disparate impact method is not available in ADEA cases.

As for the remaining circuits, the Court of Appeals for the District of Columbia has so far assumed without deciding that disparate impact is available under the ADEA. *Koger v. Reno*, 98 F.3d 631, 639 (D.C. Cir. 1996). Judge Greenberg of the Third Circuit opined in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) (opinion of Greenberg, J.), *cert. denied*, 516 U.S. 916 (1995), that "it is doubtful that *traditional* disparate impact theory is a viable theory of liability under the ADEA") (emphasis added). The Sixth Circuit suggested in *Lyon v. Ohio Education Association*, 53 F.3d 135, 139 n.5 (6th Cir. 1995), that disparate impact claims under the ADEA may no longer be viable in that court: "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory * * * . However, this circuit has stated that a disparate-impact theory of age discrimination may be possible." The Fourth and Fifth Circuits have not addressed the issue.

To resolve whether disparate impact is an available method of proving age discrimination under the ADEA, the Court should grant certiorari.

II. The Decision of the Court of Appeals is Erroneous

A number of different scholars and jurists have articulated why disparate impact should be available under the ADEA, and under what circumstances.[8] Some favor importation of traditional Title VII disparate impact analysis. Others favor models that apply disparate impact analysis, but allow the employer a defense if the challenged practice is based upon *reasonable factors*—giving that statute-based phrase less weight than the "business

[8] *See, e.g.*, Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000); Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000); Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); *cf.* David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001). *But see* Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982).

necessity" required for a Title VII disparate impact claim. And, for some, the disparate impact model is simply a method of detecting and proving the otherwise unprovable—subtle biases and concealed intent.

The petitioners agree with substantive analysis of the concurrence in the court of appeals discussed above and believe that disparate impact should be available under the ADEA as it is under Title VII. The following brief arguments further demonstrate that the court of appeals erred, and that this Court should answer the question presented without extinguishing disparate impact analysis from ADEA litigation.

A. The plain language of the ADEA in light of *Griggs* supports disparate impact. Under the ADEA, an employer may not "limit, segregate, or classify his employees in any way which would . . . adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). The ADEA does not use the word "discriminate," but instead "imposes liability for employment practices that 'adversely' affect an employee's 'status', and nowhere includes an intent requirement." Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517. Since *Griggs* holds that identical language under Title VII, 42 U.S.C. § 2000e-2(a), supports recognizing disparate impact claims, the language supports disparate impact claims under the ADEA as well. By prohibiting practices that "adversely affect" older employees, the ADEA prohibits decisions having an "adverse impact" on older employees.

B. The significance of the Secretary of Labor's 1965 report preceding the 1967 enactment of the ADEA has been overblown. *Mullin* and *Ellis*[9] relied upon the report's concern with "arbitrary discrimination" as proof that Congress enacted the ADEA to bar only intentional discrimination. *Mullin*, 164 F.3d at 703; *Ellis*, 73 F.3d at 1008. The Secretary's report *does* provide some insight into the origins of the ADEA, but does not eliminate the possibility that disparate impact may be actionable—especially given that the report was issued seven years before *Griggs*. *See Griggs*, 401 U.S. at 431 (purpose of disparate impact is to deal with arbitrary discrimination); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1215 (7th Cir. 1987) (Easterbrook, J., dissenting) (same); *see also Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. at 337-38 (arbitrary does not mean intentional). To the limited extent that the report suggests anything about disparate impact, it is hardly binding. *See generally*, Antonin Scalia, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29-37 (Amy Gutmann ed., 1997).

C. Disparate impact is just a proxy for conventional proof of intentional discrimination. *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1078-80 (7th Cir. 1994)

---

[9] In reaching its conclusion, the court of appeals in this case primarily followed *Mullin* and *Ellis*. App., *infra*, 6a-8a.

(Cudahy, J., dissenting). As Judge Cudahy stated in *Francis W. Parker School*:

> [T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw.

41 F.3d at 1080-81 (quoting *Hazen Paper*, 507 U.S. at 604). This view of the proper role of disparate impact was previously suggested in a dissent joined by Chief Justice Rehnquist and Justice O'Connor in *Connecticut v. Teal*, 457 U.S. 440 (1982):

> In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof [of discriminatory intent] by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs.

457 U.S. at 458-59 (Powell, J., dissenting); *see also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination").

If disparate impact is viewed in this way, a plaintiff terminated by a seemingly innocent underling might be able to prevail by showing both strong statistical evidence of disparate impact on a company-wide basis, and (for example) evidence that the company's chief executive officer sought to eliminate older workers *because of*

their age. While a direct connection between the decision maker and the executive might be tenuous in a disparate treatment case, adequate evidence under a disparate impact model could allow the employee to show that the corporate culture had been pervaded by ageism—the sort of subtle systemic bias that *Griggs* sought to eliminate.

D. The ADEA "reasonable factors other than age" exception authorizes employment practices that would be "otherwise prohibited;" thus, the substantive prohibitions of the ADEA *must* bar actions that do not constitute disparate treatment. As Dean Player has explained:

> If age motivated the employer's action, [the prohibition] establishes prima facie liability. Now turning to [the reasonable factors exception]; it allows the action if the factor used is "reasonable" and "other than age." There is no way [the exception] could ever have an application if [the prohibitions of the ADEA are] limited to motivated decision making. If [the prohibition does] not extend beyond age motivation, there would be no need to have [the exception] because age motivated decisions could not possibly be for reasons other than age. The only way for [the exception] to have structural validity is to recognize that [the prohibition] can be violated by non-age or age-neutral factors. At this point, [the exception] would allow the employer to establish the defense that the challenged device was both neutral in terms of intent and was "reasonable."

Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act, 31 U. RICH. L. REV.

819. Under this analysis, every word in the ADEA provisions at issue is given effect—including the word *reasonable*.

E. Although Title VII does not have an identical "reasonable factors" clause, it does recognize the business necessity defense. Title VII and the ADEA have different provisions because "Congress intended employers to have more leeway in considering factors that disparately affect older workers under the ADEA than factors that disparately affect classes protected under Title VII." *EEOC v. Newport Mesa Unified School District*, 893 F. Supp. 927, 932 (C.D. Cal. 1995). Thus, although the burden of demonstrating "reasonableness" may be lower in ADEA disparate impact claims, the primary test is the same: Does the practice disparately impact protected individuals?

F. *If* Congress's failure to act after courts repeatedly approved ADEA disparate claims does *not* mean that Congress approved such claims because "vindication by congressional inaction is a canard,"[10] then little should be read into the fact that Congress codified disparate impact after *Wards Cove* in its 1991 amendments to Title VII without doing so for the ADEA. If vindication by congressional inaction is not a fiction, however, there is a potential argument that ADEA plaintiffs remain in the position that Title VII plaintiffs were in between *Wards Cove* (in 1987) and 1991. If so, ADEA plaintiffs may use

---

[10] *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

the disparate impact method of proving age discrimination, but the employer has only to show that the challenged action significantly served a legitimate business objective, and the plaintiff has at all times the burden of persuasion. *Wards Cove*, 490 U.S. at 659.

III. The Question Presented is Important

There is a plethora of scholarly opinions regarding whether and when disparate impact analysis is applicable to the ADEA.[11] A number of post-*Hazen* writers agree on *one* topic, however: The Court should resolve the issue. As a recent writer observed:

> Since *Hazen*, several courts of appeal have reconsidered the validity of a disparate impact claim under the ADEA. Some have reversed prior rulings, which had allowed for ADEA disparate impact claims, while others have refused to do so without a clear directive from the Supreme Court. The Supreme Court has denied petitions for a writ of certiorari on the issue several times, leaving lower courts to speculate regarding the appropriateness of disparate impact under the ADEA.

Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability, 36 IDAHO L. REV. 316-17. Another commentator, favoring a *non*-Title VII type of disparate impact analysis for ADEA cases, said:

---

[11] *See, e.g., supra*, n.8.

> The lower courts have split on the issue. Unless clarification is brought to this area of the law, ADEA plaintiffs seeking to challenge an age-neutral employment practice adversely affecting older workers will have different results based merely upon the federal circuit in which their suit is brought.

The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?, 69 U. CIN. L. REV. at 300 (footnotes omitted). Another commentator urged:

> The intercircuit split on the issue of whether disparate impact claims should be recognized under the ADEA is a significant one. Its resolution has the potential to increase or reduce the number of successful ADEA claims. The ability to use a disparate impact theory as a basis for ADEA claims is important to plaintiffs who have difficulty obtaining direct or even circumstantial evidence of age discrimination.

Recent Cases Affecting The Role of The ADEA in Protecting Older Workers, 39 DUQ. L. REV. 437. And still others have put it this way:

> Faced with no clear guidance from the Supreme Court and the mix of opinions of the various appellate courts, lower courts and legal commentators continue to struggle with the issue.
>
> * * *
>
> [T]he authors believe that it is important that the Supreme Court provide immediate guidance to the lower courts regarding the viability of the disparate impact theory under the ADEA.

ADEA Disparate Impact in The Sixth Circuit, 27 OHIO N.U. L. REV. at 2, 18; *see also Wards Cove Packing or Not Wards*

Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act, 31 U. RICH. L. REV. 819 ("the new division between circuits makes the issue ripe for Supreme Court resolution").

While there may be, as the *Hazen* concurrence stated, "substantial *arguments* that it is improper to carry over disparate impact analysis from Title VII to the ADEA,"[12] the issue is far from a dead letter, and the proposed arguments do not resolve whether *some* form of disparate impact is available to ADEA plaintiffs as a means of proving age discrimination. The time has come for the Court to resolve whether disparate impact analysis is appropriate in ADEA litigation and, if so, under what conditions.

---

[12] *Hazen*, 507 U.S. at 617 (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of counsel:
EDWARD L. SCOTT
409 Southeast Fort King Street
Ocala, Florida 34471

SCOTT CHARLTON
CLARK, CHARLTON & MARTINO, P.A.
3407 West Kennedy Boulevard
Tampa, Florida 33623

JOHN G. CRABTREE
Counsel of Record

THOMAS M. PFLAUM
JOHN G. CRABTREE, P.A.
240 Crandon Boulevard
Suite 279
Key Biscayne, Florida 33149
(305) 423-4350
Counsel for Petitioners

October 2001

APPENDIX A

United States Court of Appeals
Eleventh Circuit.

Wanda L. ADAMS, Leo L. Floyd, et al., Plaintiffs, Counter-defendants,
Appellants,
v.
FLORIDA POWER CORP., Florida Progress Corporation, Defendants, Counter-claimants, Appellees.

No. 99-15306.

July 5, 2001.

Stuart C. Markman, Kynes, Markman & Felman, P.A., Scott Charlton, Clark, Charlton, Martino & Borders, P.A., Tampa, FL, Edward L. Scott, Scott & Gleason, P.A., Ocala, FL, Michael Steven Finch, Saint Petersburg, FL, for Appellants.

Robert E. Gaddy, Florida Power Corp., St. Petersburg, FL, J. Lewis Sapp, Nancy F. Reynolds, Elarbee, Thompson & Trapnell, Atlanta, GA, Alison B. Marshall, Glen D. Nager, Jones, Day, Reavis & Pogue, Washington, DC, for Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, BARKETT and MAGILL,* Circuit Judges.

BIRCH, Circuit Judge:

This case presents an issue of first impression in our circuit regarding whether a disparate impact theory of

---

* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

liability is available to plaintiffs suing for age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court ruled as a matter of law that disparate impact claims cannot be brought under the ADEA. Because the question presents a controlling issue of law in the case, and the judge opined that there were substantial grounds for disagreement over his decision, he certified the question to us pursuant to 28 U.S.C. § 1292(b).[1] We exercise our discretion to take the case and AFFIRM.

I. BACKGROUND

Florida Power Corporation ("FPC") operated as a publicly-regulated electric utility monopoly until 1992, when Congress opened the industry to competition through the Energy Policy Act of 1992, 106 Stat. 2776 (1992). Florida Progress Corporation is its parent corporation. Wanda Adams and several other plaintiffs (the "Adams class") were terminated by FPC between 1992 and 1996, during a series of reorganizations the company states were necessary to maintain its competitiveness in the newly deregulated market. Members of the Adams

---

[1] Our sister, in her concurring opinion, concludes that we overreach by deciding the question of whether disparate impact claims are cognizable under ADEA as a matter of law. She would find that the plaintiffs failed to adequately allege a disparate impact claim. This position is inconsistent with the posture of the case. The district court expressly made no findings of fact on the sufficiency of the allegations in the plaintiffs' complaint. Indeed, because the district court certified only the question of law to us, a "pronouncement in the abstract" is required.

class sued FPC and its parent corporation claiming, *inter alia*, that FPC discriminated against them because of their age, in violation of the ADEA.

In 1996, the district court conditionally certified a class of former FPC employees claiming age discrimination. In August 1999, the district court decertified the class and ruled as a matter of law that a disparate impact theory of liability is not available to plaintiffs bringing suit under the ADEA.[2] Because there is some conflict among the circuits and we had not yet ruled on the availability of disparate impact claims under the ADEA, the district court certified the question to us pursuant to 28 U.S.C. § 1292(b).[3] The court was careful to note that he made no findings of fact or assessment of whether the Adams class could produce evidence sufficient to state a claim for disparate impact. Accordingly, the sole question

---

[2] The court also found that the plaintiffs' disparate treatment claims were not sufficiently similar to support proceeding as a class. Accordingly, the court held that the Adams class members would each have to pursue their individual remedies separately.

[3] The district court's Order of Certification states the following:

> [W]hether I am right or wrong in ruling that the disparate impact theory of liability is unavailable to these Plaintiffs is a critical issue that ought to be resolved with finality before the Court can reasonably proceed with the management of this litigation toward trial. . . . The controlling question of law is whether the "disparate impact" theory or method of proving liability is applicable to claims brought under the [ADEA].

R3-312, at 2-3 (internal citations omitted).

before us is whether, as a matter of law, disparate impact claims may be brought under the ADEA.

II. DISCUSSION

We review the district court's interpretation of a statute *de novo*. *United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir.2000). As with any question of statutory interpretation, we begin by examining the text to determine whether its meaning is clear. "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir.1997). "Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc), *cert. denied*, 528 U.S. 933, 120 S.Ct. 335, 145 L.Ed.2d 261 (1999).

The language of the ADEA closely parallels that of Title VII. *See Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII.") In fact, the sections forbidding discrimination are almost identical. *Compare* 29 U.S.C. § 623(a)(1) (ADEA) *with* 42 U.S.C. § 2000e-2(a)(1) (Title VII). The Supreme Court has held that Title VII supports a cause of action for employment discrimination based on a disparate impact theory.[4] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

---

[4] A disparate impact claim is one that "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993) (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1855 n. 15, 52 L.Ed.2d 396 (1977)).

Several circuits have relied on the holding in *Griggs* to find that, because the language of the ADEA parallels Title VII, disparate impact claims also should be allowed under the ADEA. *See Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir.1980); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir.1996); *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir.1984). In a case involving liquidated damages under the ADEA, the Supreme Court explicitly left open the question of "whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993). The Second, Eighth, and Ninth Circuits have read *Hazen* literally and continue to allow disparate impact claims. *See Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.1997) (per curiam); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir.1997); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir.2000); *E.E.O.C. v. Local 350*, 998 F.2d 641, 648 n. 2 (9th Cir.1993).

In contrast, the First, Third, Sixth, Seventh, and Tenth Circuits have questioned the viability of disparate impact claims under the ADEA post-*Hazen*.[5] *See Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir.), *cert. denied*, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *E.E.O.C.*

---

[5] The Fourth, Fifth, and D.C. Circuits have not addressed this issue.

v. Francis W. Parker School, 41 F.3d 1073, 1076-77 (7th Cir.1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir.1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.1995); *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir.1995). These cases rely on language in *Hazen* and other factors that suggest that disparate impact claims are not viable under the ADEA.

First, courts that question the viability of a disparate impact claim under the ADEA note that the text of the ADEA differs from Title VII in an important respect. Section 623(f)(1) of the ADEA explicitly provides that an employer may "take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The First Circuit has reasoned that

> if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination." Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction].

Mullin, 164 F.3d at 702.

In addition, the language of § 623(f)(1) is similar to language found in the Equal Pay Act. Section 206(d)(1) of the Equal Pay Act provides that wage discrimination on the basis of gender is prohibited, unless the wage "differential [is] based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). "The Supreme Court [has] interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims." *Ellis*, 73 F.3d at 1008 (citing

County of Washington, Ore. v. Gunther, 452 U.S. 161, 170-71, 101 S.Ct. 2242, 2248-49, 68 L.Ed.2d 751 (1981)); *Mullin*, 164 F.3d at 702 (drawing same comparison).[6] The text of the ADEA is sufficiently distinguishable from Title VII as to raise doubts about extending the disparate impact theory of liability to ADEA cases.

Turning to the legislative history, the *Mullin* and *Ellis* courts note that the ADEA was enacted after the Secretary of Labor issued a report on age discrimination. *Mullin*, 164 F.3d at 702-03; *Ellis*, 73 F.3d at 1008. The report, entitled *The Older American Worker: Age Discrimination in Employment* (1965), recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways. *Ellis*, 73 F.3d at 1008. Thus, the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact. *See Griggs*, 401 U.S. at 432, 91 S.Ct. at 854 (discussing the history of amendments to the bill and noting that for Title VII, Congress specifically "placed on

---

[6] We note that the ADEA requires that the "other factor" be a reasonable one, while the Equal Pay Act finds "any other factor" acceptable. *Compare* 29 U.S.C. § 623(f)(1) *with* 29 U.S.C. § 206(d)(1)(iv). It could be argued that this difference distinguishes the ADEA from the Equal Pay Act, and supports the inference that the reasonableness requirement refers to the business necessity justification that, in Title VII cases, can be used to defend an employment qualification that has a disparate impact on employees in the protected class. In light of the differences between the ADEA and Title VII discussed herein, we decline to draw such an inference.

the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

Finally, while the *Hazen* Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot. First, the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610, 113 S.Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable. *Id.* at 611, 113 S.Ct. at 1706-07. That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

III. CONCLUSION

The Second, Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not. We find the reasoning of the Tenth Circuit in *Ellis* and the First Circuit in *Mullin* persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

BARKETT, Circuit Judge, specially concurring:

I would affirm the district court's ruling in this case, but for reasons other than the one relied upon by the district court.[1] I do not believe the complaint here pleads a disparate impact claim sufficient to qualify for class certification. Thus, because I find that plaintiffs have sufficiently alleged only that they suffered disparate treatment, and the district court's denial of certification on the disparate treatment claim is not at issue on this appeal, I believe it is unnecessary and premature to address the question of whether disparate impact claims are cognizable under the ADEA. I think it especially unwise because this question does not lend itself to a pronouncement in the abstract.

The decision as to whether a disparate impact claim is available in an age discrimination case should be made on a case specific basis rather than on an overreliance on decontextualized language from the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). The purposes of the ADEA, the Supreme Court's treatment of the issue in *Hazen Paper*, and consideration of the various views of our sister courts, lead me to conclude that disparate impact can be pled and proved in an appropriate case

---

[1] We may affirm the district court's decision for reasons different than those stated by the district court. *See* Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) (stating that the decision of the lower court must be affirmed if the result is correct even though the lower court relied upon a wrong ground or gave a wrong reason); *see also Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1434 (11th Cir.1998).

under the ADEA, and that it cannot be said as a matter of law that this theory of recovery can never be used in an age discrimination case.

First of all, the purpose of the ADEA, like the purpose of Title VII and the ADA, is to eradicate employment discrimination based on the stigmatizing stereotypes of age, race, gender or disability. Disparate impact claims provide an avenue for members of protected classes to prove that discrimination occurred in the workplace when proof of motive is difficult or unavailable. Beginning with *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court recognized that although discriminatory intent could be hidden, even from the decisionmaker himself, its effects in the workplace could not. Thus, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431, 91 S.Ct. 849. Accordingly, the Supreme Court interpreted Title VII to permit a member of a protected group to challenge facially neutral employment practices that perpetuate inequality by disproportionately burdening a protected class.

However, pleading a disparate impact case only gets you into the courthouse. An employer in every statutory context can defend a disparate impact case by citing a legitimate business necessity for the neutral policy at issue.[2] Thus, in those cases where it can be shown that

---

[2] Title VII requires an employer to demonstrate that the challenged practice is a job related business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The ADA defines discrimination as including the use of "selection criteria that screen out or tend to

the decision causing the disparate impact was based on business necessity, the claim will be defeated.[3] Disparate impact is not an easy theory to plead and prove in any context. I believe that it is probably a more difficult claim to make under the ADEA than in a race or gender context because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups. *See Hazen Paper*, 507 U.S. at 610-11, 113 S.Ct. 1701.

The majority, however, concludes that disparate impact claims are simply not viable because Section 623(f)(1) of the ADEA *specifically* exempts a decision based on factors other than age, notwithstanding its similarity to Title VII. 29 U.S.C. § 623(f)(1). But, as noted, in every statutory discrimination case, a decision based upon legitimate business necessity will never support a

---

screen out an individual with a disability or a class of individuals with disabilities" unless such criteria are "shown to be job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. § 12112(b)(6).

[3] *See, e.g., Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 951 (8th Cir.1999) (employer in ADA suit could raise business necessity defense to plaintiff's claim that employer's physical performance test has a disparate impact); *Davis v. City of Dallas*, 777 F.2d 205, 208 (5th Cir.1985) (finding that city's requirement that applicants for police officer must have completed 45 semester hours of college credit with at least C average at accredited college or university, must not have history of recent or excessive marijuana use, and must not have been convicted of more than three hazardous traffic violations in preceding 12 months, were job related).

claim for liability. *Griggs* itself recognized and repeatedly emphasized that disparate impact is a basis for relief only if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment." *Id.* at 431, 91 S.Ct. 849. Section 623(f)(1) of the ADEA adds nothing new. Therefore, Section 623(f)(1) of the ADEA should not be interpreted as anything more than a statutory description of the business necessity defense.

In fact, the EEOC interpretive guidelines, which are entitled to judicial deference,[4] suggest that the "reasonable factors" defense in the ADEA works in tandem with the business necessity defense in the disparate impact analysis. These guidelines indicate that an employer may raise a "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." *See* 29 C.F.R. § 1625.7(d) (1999).[5] In light of the parallels between the

---

[4] *Edwards v. Shalala*, 64 F.3d 601, 606 (11th Cir.1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (10th Cir.1994)); *see also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-98, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991); *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[5] EEOC guidelines interpret the "reasonable factor other than age" defense as limited only to factors justifiable as a "business necessity":

> (d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.
>
> (e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.
>
> (f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plants which qualify for the section 4(f)(2) exception to the Act.

29 C.F.R. § 1625.7 (2000).

substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims,[6] a reasonable interpretation of Section

---

[6] After the *Griggs* decision, several courts extended disparate impact analysis to the ADEA. *See, e.g., Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir.1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir.1980); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F.Supp. 1494, 1505 (N.D.Ill.1983). Congress has amended the ADEA several times since *Griggs*. *See e.g.*, Age Discrimination in Employment Amendments of 1986, Pub.L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub.L. No. 98-459, § 802, 98 Stat. 1792 (1984). None of the amendments have limited or prohibited disparate impact analysis. *See also EEOC v. Governor Mifflin Sch. Dist.*, 623 F.Supp. 734, 740-41 (E.D.Pa.1985) (analyzing amendments to the ADEA and finding no prohibition against disparate impact claims).

623(f)(1) is that it codifies the business necessity exception to disparate impact claims.

I am unpersuaded by the majority's conclusion that the the [sic] Supreme Court's determination that a similar provision in the Equal Pay Act ("EPA") precludes disparate impact claims. *See County of Washington, Ore. v. Gunther*, 452 U.S. 161, 170-71, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). There are several problems with analogizing from the EPA to the ADEA. First, this case concerns the substantive provisions of the ADEA, which have been recognized to share common substantive provisions as Title VII, and not the remedial provisions of the ADEA which are similar to the remedial provisions of the EPA. *Wallace v. Dunn Construction Co.*, 62 F.3d 374, 378 (11th Cir.1995). Second, Section 206(d)(1) of the EPA permits discrepancies in wages paid to male and female workers for "any other factors other than sex." 29 U.S.C. § 206(d)(1)(iv). The EPA thus merely requires the employer to provide a neutral explanation for any disparity in pay. The EPA's broad defense for employers ensures that the Act targets only intentional purposeful discrimination.[7] In contrast,

---

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

[7] *See Gunther*, 452 U.S. at 170, 101 S.Ct. 2242 (noting that in comparison to Title VII, which permits disparate impact claims, the Equal Pay Act "was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. . . . Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a

under section 623(f)(1) of the ADEA, the employer must demonstrate the *reasonableness* of the neutral factor. The ADEA's narrow limitation of liability ensures that the Act reaches all arbitrary age discrimination.

Furthermore, I disagree with the majority's interpretation of *Hazen Paper* as precluding disparate impact claims under the ADEA. The Court in *Hazen Paper* took great care to say explicitly that that decision should not be read to address a disparate impact case: "[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Hazen Paper*, 507 U.S. at 610, 113 S.Ct. 1701. In *Hazen Paper*, the neutral policy at issue was the termination of an employee who was close to vesting under his pension plan. As the Court recognized, the policy could have affected "older" and "younger" workers alike. The crucial fact underlying the Supreme Court's decision in *Hazen Paper* was that Hazen Paper decided to fire the plaintiff on the basis of his pension status which, under the company's policy, was based on years of service, not age. The Court explained that "an employee's age is analytically distinct from his years of service." *Id.* at 611, 113 S.Ct. 1701.

> An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, *see* 29 U.S.C. § 631(a),

---

bona fide use of 'other factors other than sex.' "); *Varner v. Illinois State University*, 226 F.3d 927, 934 (7th Cir.2000) ("By providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women.").

> may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

Id. Accordingly, the claimant could not prevail when he was fired on this basis, even though he was 62 years old. The Court held that the motivation to avoid the vesting of pension benefits was insufficient to state a disparate treatment claim under the ADEA because the evidence did not show that Hazen Paper's decision was based on the plaintiff's age. *Id.* ("When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."). However, the Court also made clear that:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

Id. at 612-13, 113 S.Ct. 1701 (citation omitted). Thus, the Court did not rule out the possibility that an employer's purported reliance on an age-proxy could reflect the type of "inaccurate and denigrating generalization about age"

that the ADEA was designed to prohibit. *Id.* at 612, 113 S.Ct. 1701. For example, there is nothing in *Hazen Paper* that addresses a disparate impact challenge to an employer's insurance policy which might provide coverage for health problems affecting young employees, but exclude coverage for health problems affecting older employees (for example, a policy which covered braces but not dentures, or a policy generally covering progressive, neurodegenerative diseases except for Alzheimer's disease). *See also Arnett v. California Public Employees Retirement System*, 179 F.3d 690 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 930, 145 L.Ed.2d 807 (2000) (plaintiffs' claim that employer's disability benefits program which discriminated on the basis of potential years of service, rather than actual years of service, adversely affected older workers stated a valid claim of disparate impact under the ADEA). Furthermore, the Court explicitly stated that it did not consider a situation in which the employee's pension status is based on *age*, rather than years of service:

> [W]e do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service and the employer fires the employee in order to prevent vesting.

Hazen Paper, 507 U.S. at 613 (citation omitted).

Finally, the majority is of the view that the legislative history of the ADEA suggests it was not enacted to address disparate impact claims, citing the report commissioned from the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965). The report recommended that Congress prohibit "arbitrary

discrimination," but that factors which "affect older workers" be addressed through programmatic measures to improve opportunities for older workers. *Id.* at 21-25. That report differentiated between what it termed "arbitrary discrimination" based on age and problems resulting from factors that "affect older workers more strongly, as a group, than they do younger employees." *Id.* at 5, 11. The majority concludes that this precludes disparate impact claims because these are claims that only address "factors that affect older workers more strongly," not arbitrary discrimination. But this begs the question. The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination. Claimants should have the opportunity to prove it when it is the latter.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al.,

Plaintiffs,

-vs-

FLORIDA POWER CORPORATION, et al.,

Defendants.
_____/

Case No.
95-123 CIV-OC-10A

ORDER ON PENDING MOTIONS

(Filed Aug. 26, 1999)

On June 22, 1998 (Doc. 215) I entered a comprehensive order disposing of all pending motions in this case and in the related case of *Akin v. Florida Power Corporation, et al.*, Case No. 97-173 Civ-OC. That Order should be read in conjunction with this one for the purpose of gaining an understanding of the history of the action.

There are three motions now before the Court. They are, in reverse order, a motion by the Plaintiffs to enforce settlement (Doc. 263); a motion by the Defendants for summary judgment (Doc. 238); and a motion by the Defendants to decertify the Plaintiff class (Doc. 221).

Plaintiff's Motion To Enforce Settlement (Doc. 263)

The Plaintiffs claim that they entered into an oral meeting of the minds with the Defendants – an offer and

acceptance – resulting in a settlement agreement that the Defendants have repudiated and refuse to perform. The Plaintiffs therefore move (Doc. 263) for an order enforcing the agreement. The Defendants respond that no such agreement was made; that essential terms of the alleged agreement remained unresolved, including the requirement of a written settlement agreement; and that the governing statute, OWBPA, 29 USC § 626(f)(1)(A) and (2), expressly requires a written agreement settling the ADEA claims.

In the common vernacular, there appears to be a swearing contest between the lawyers, one that the Court would doubtless find difficult if not impossible to decide on the merits of the claim if a full blown evidentiary hearing should be conducted. It is for that very reason that the rules of the Court, quite apart from the governing statute, expressly require that all agreements between the parties must be "reduced to writing and subscribed by the party or attorney against whom it is asserted." Rule 4.15, M. D. Fla. Rules. And, as Defendants point out, the OWBPA contains the same requirement relating to ADEA claims. It follows that the motion to enforce settlement (Doc. 263) must be, and is, DENIED.

Defendants' Motion For Summary Judgment (Doc. 238)

In the Order of June 22, 1998 (Doc. 215) the Court ruled with regard to certain identified Plaintiffs that their claims under the Florida Civil Rights Act (the FCRA) were precluded as a matter of law by releases entered into by those Plaintiffs in exchange for certain payments made by the Defendants, the OWBPA being inapplicable

to those state law claims. The Court also ruled that the ERISA claims of all Plaintiffs should be dismissed, with leave to amend, for failure to allege exhaustion of administrative remedies before filing suit (see Doc. 215 at pages 17-18). However, no such amendment was ever filed.

Treating those rulings as establishing the law of the case, the Defendants' present motion for summary judgment seeks to apply those rulings to the Plaintiffs who have joined or have opted into the action since June 22, 1998, the date of the filing of the Plaintiffs' Sixth Amended Complaint (Doc. 216). Without conceding the motion itself, the Plaintiffs do not contest that the Court's prior rulings are controlling with respect to the issues presented by the motion. The Plaintiffs suggest only that the entry of final judgment on the Plaintiffs' FCRA and ERISA claims be withheld under Rule 54, as was done before, pending a resolution of the case as a whole.

Accordingly, the Defendants' Motion for Summary Judgment (Doc. 238) is GRANTED and summary judgment will be entered in favor of the Defendants and against the following Plaintiffs with respect to any FCRA or other state law claims they may have had against the Defendants. Those Plaintiffs are: Linda Baldwin, Philip Bassa, Cynthia Behrens-Boga, Richard Boreman, Linda Boyle, Gerald Brannen, Donald Breeden, Robert Bunch, Polly Gillespie, Ralph Graves, Thomas Hays, Gopal Hegde, Gloria Maxwell, Thomas Neaman, William Passmore, David Reed, Patti Schmidt, Randy Seifert, Darwin Shiflett, Jiri Skala, William Sullivan, Steve Twitty, Wendy Wheeler, Barry Wood, Willis Barnes, Elaine Barnes-Foster, Patsy Baynard, Gary Becker, Donald Broeckel, Richard Brown, Judith Carey, Charles Coffman, Kenneth Corbett,

Tom Engers, Gwendolyn Evans, Ray Forehand, M.W. Foster, Robert Freeland, Valerie Fronza, Narendra Garg, Michael Harmeling, Eugene Hayward, Roy Hooks, Carrie Jones, G.E. Lamm II, Thomas Livingston, Ray Long, John Mascoll, Mary McCoy, Carol McFadden, Michael Moore, David Morris, Adolfo Paz, Mark Peterson, Andre Poullard, Dan Putnam, Bill Rich, Alexa Richardson, Terrence Ryan, Lorene Scott, Terrie Scott, John Serba, Patricia Solki, Robert Urban, David Visser, Daniel Wagner, Gary Waldo, Dale Wilson, and Guy Zissimopulos.

In addition, the Defendants' motion for summary judgment (Doc. 238) is GRANTED and summary judgment will be entered in favor of the Defendants and against all Plaintiffs with respect to any ERISA claims any Plaintiffs may have had against the Defendants. Entry of final judgment to that effect will be withheld under Federal Rule of Civil Procedure 54 pending resolution of the case as a whole.

Defendants' Motion To Decertify (Doc. 221)

The Defendants move to decertify the Plaintiffs' class on the ground that the members of the class are not "similarly situated" within the meaning of the statute under which the class was previously certified. 29 USC § 216(b) made applicable to ADEA cases by 29 USC § 226(b). They argue, convincingly, that the Plaintiffs' claims are dissimilar because they worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at

different times by different decision makers based on different considerations of criteria. Also, if the Plaintiffs or any of them prevail, the case of each will vary according to the selection of an individual remedy – the calculation of damages, including resolution of issues of mitigation, or the appropriateness of equitable relief including the possibility of reinstatement.

The only real connection between the Plaintiffs as a class – their "similarily situated" relationship – lies in the fact that they were all employees of the Defendants who were over 40 and were discharged during and because of a planned reduction in force carried out by the Defendants on or after July 1, 1993. To my mind, therefore, whether the class should be decertified depends entirely upon an issue of law, namely, the question of whether the disparate impact theory[1] is an available mode of proof under the ADEA as it is under Title VII of the Civil Rights Act. The Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, *Hazen Paper Company v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706 (1993), and neither has the Eleventh

---

[1] *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1854-55, n.15 (1977):

> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See *infra*, at 1861. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. [citations omitted]

Circuit. *Turlington, v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1436-37, n.17 (1998).

The other circuits are remarkably divided on the issue. The Second, Eighth and Ninth Circuits have held that the disparate impact theory is applicable to the ADEA.[2] The First, Seventh and Tenth Circuits have held that it is not.[3] The Sixth Circuit[4] and at least one judge in the Third Circuit,[5] like the Eleventh, have not decided the question but have expressed doubt in the wake of *Hazen* that the theory is available under the ADEA. The Fourth, Fifth and D.C. Circuits have not discussed the problem.

I conclude that the disparate impact theory of liability is not applicable to ADEA claims. The decision of the Tenth Circuit to that effect in *Ellis, supra*, n. 3. is the most comprehensive and the most persuasive of the authorities on point, and no useful purpose would be served by elaborating here upon the opinion of the Tenth Circuit there.

---

[2] See *Criley v. Delta Airlines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); and *Arnett v. California Public Employees Retirement System*, 179 F.3d 641, 647-48 (9th Cir. 1999).

[3] *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-703 (1st Cir. 1999); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-1009 (10th Cir. 1996).

[4] *Lyon v. Ohio Education Ass'n.*, 53 F.3d 135, 139-40 and n.5 (6th Cir. 1995).

[5] *DiBiase v. Smith Kline Beechman Corporation*, 48 F.3d 719, 734 (3d Cir. 1995).

I conclude as a matter of law, therefore, that the disparate impact theory of liability in employment discrimination cases does not apply to ADEA claims; and, having so determined, I also conclude that the named Plaintiffs in this action are not "similarly situated" in relation to the other members of the putative class. Stripped of the disparate impact theory and forced to rely individually upon proof of disparate treatment, the individual features of each claim predominate over the common ones and the Motion to Decertify (Doc. 221) must be GRANTED.

In reaching this conclusion I have not overlooked the Plaintiffs' apparent contention that their theory of liability can also be categorized as a disparate *treatment* theory in the sense that the overall reduction in force was allegedly conceived as a means of eliminating older employees in general, not as a cost-saving economic measure; but, even if that could be proved, there would be no causal relationship between that upper management decision and the termination of individual employees where the ultimate decision maker was a lower level supervisor who was not informed of upper management's unlawful intent and who ostensibly acted in good faith in selecting the individual Plaintiff for separation on the basis of factors other than age. In other words, it would still be necessary to examine the motives of the person who decided to fire each Plaintiff, individually, and that individual characteristic of the claim of each Plaintiff predominates over any remaining common features of the claims.

Neither have I overlooked the Defendants' obvious position that even if a disparate impact analysis should

be applied, the adverse effect of the downsizing upon ADEA protected employees was justified by a business necessity. But the issue of whether the Plaintiffs could ever prove the facts necessary to establish a disparate impact case, or whether the Defendants could successfully defend by proving business necessity, is simply not before the Court at this moment. Rather, the lone immediate issue is whether the Plaintiffs, as a class, should be given the opportunity to prove a disparate impact case.

I am also of the view, however, that the legal issue driving this decision to decertify the class – the inapplicability of the disparate impact theory to ADEA cases – is a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." 28 USC § 1292(b). By decertifying the class, an enormous amount of time, energy and cost will likely be expended in the near future as counsel and the parties undertake to pursue discovery and otherwise litigate the 116 individual claims that will be revived in the parallel case of *Akin v. Florida Power Corporation*, Case No. 97-173 Civ-OC. Yet, if I am wrong, much of that time, energy and cost may well be wasted. The only downside to an immediate interlocutory appeal is the additional time required by the appellate process in a case in which the court is already acutely conscious of its age (caused in large part by the Court's own delay in reaching and deciding the pending motions). It is to be hoped, however, that some of the time consumed by an appeal will actually operate to conserve some of the remaining time to be expended in

disposing of the litigation as a whole. Also, there is ample precedent in the law of this circuit for making a Section 1292(b) certificate to the Court of Appeals regarding controlling issues of law in deciding class action issues in ADEA cases. See, *Grayson v. K-Mart Corp.*, 79 F.3d 1066 (11th Cir. 1996). See also, *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (1998) *en banc*.

Before the case is certified for immediate appeal, however, the parties should be given an opportunity to be heard concerning that important step.

It is therefore Ordered that the parties show cause, if any, by written memoranda to be filed within twenty (20) days why the Court should not certify this Order under 28 USC § 1292(b) to the United States Court of Appeals for the Eleventh Circuit to the extent that it decertifies the Plaintiffs' class on the legal basis that the disparate impact theory of liability is not available in ADEA cases. The parties are also directed to show cause, if any, why the *Adams* case should not be dismissed as duplicative (given decertification of the class), coupled with a simultaneous reopening of the *Akin* case to be followed, then, by another directive that all proceedings in *Akin* be stayed pending outcome of the appeal in *Adams*.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 26th day of August, 1999.

/s/ Hon. Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

c: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS,
et al.,

Plaintiffs,

Case No.
95-123 CIV-OC-10A

-vs-

FLORIDA POWER
CORPORATION, et al.,

Defendants.
_____/

ORDER OF CERTIFICATION
Pursuant to 28 USC § 1292(b)

(Filed Oct. 27, 1999)

By Order entered on August 26, 1999 (Doc. 302), the Court decertified the Plaintiff class on the legal basis that the "disparate impact" theory of proof is inapplicable to ADEA claims and, absent the Plaintiffs' ability to rely upon that theory to prove liability, the individual aspects of their claims clearly predominate over any common issues so that class adjudication would be unmanageable and inappropriate. Stated another way using the terms of the governing statute (29 USC § 216(b)), the Plaintiff class would not consist of "employees similarly situated."

In the Order of August 26 I also expressed the view that the legal issue driving the decision to decertify the class – the inapplicability of the disparate impact theory to ADEA cases – is a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially

advance the ultimate termination of the litigation." 28 USC § 1292(b). The parties were therefore invited to comment on the question whether the case should be certified for interlocutory appeal under § 1292(b).

The Plaintiffs' response (Doc. 304) supports certification of the issue for appeal. The Defendants' response (Doc. 305) opposes such certification. They argue that whether the disparate impact theory of liability applies to ADEA claims is not a "controlling issue of law," and that even if the issue should be resolved in favor of the Plaintiffs, the disparate *treatment* claims of the individual Plaintiffs must still be litigated.[1] I find these arguments unpersuasive. The disparate impact question is clearly a controlling question on the issue of liability *to the class*. And, while individual damages issues and/or certain individual defenses may remain even if Plaintiffs are permitted to pursue that theory and do so successfully, such a result may well moot the individual disparate *treatment* claims as a separate theory of liability. In short, and in simplest terms, whether I am right or wrong in ruling that the disparate impact theory of liability is unavailable to these Plaintiffs is a critical issue that ought be resolved with finality before the Court can reasonably proceed with the management of this litigation toward

---

[1] The Defendants also mount factual arguments designed to show that the Plaintiffs were the subjects of an individualized selection process and that there was no general policy or practice having any disparate impact upon the Plaintiffs as a class. But these contentions simply miss the present point. The present issue is not whether the Plaintiffs can prove a disparate impact case, but whether as a matter of law they should be given any opportunity to do so.

trial whether as a class action or as a series of individual claims.[2]

Accordingly, pursuant to 28 USC § 1292(b), I hereby certify to the United States Court of Appeals for the Eleventh Circuit that the Order on Pending Motions (Doc. 302) entered by me in this action on August 26, 1999, granting the Defendants' Motion to Decertify (Doc. 221), involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order (Doc. 302) may materially advance the ultimate termination of the litigation. The controlling question of law is whether the "disparate impact" theory or method of proving liability (see *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1854-55, n.15 (1977)), is applicable to claims brought under the Age Discrimination in Employment Act, 29 USC § 621, et seq.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 27th day of October, 1999.

/s/ Hon. Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

c: Counsel of Record

---

[2] The individual claims have been brought in a separate, parallel action. *Akin v. Florida Power Corporation*, Case No. 97-173 Civ.Oc.